United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

affidavit of service

75-2140

To be argued by
David L. Birch

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CHARLES SNYDER,

Plaintiff-Appellee,

-againstp

PETER PREISER, individually and in his capacity as Commissioner, New York State Department of Correctional Services; VINCENT TURNELLO, individually and in his capacity as Superintendent of Fishkill Correctional Facility; and ROY BOMBARD, individually and in his capacity as Deputy Superintendent of Fishkill Correctional Facility,

Defendants-Appellants.

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P/S

BRIEF FOR DEFENDANTS-APPELLANTS

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BRIEF FOR DEFENDANTS-APPELLANTS

Questions Presented

1. Is removal from work release properly accompanied by the procedures attendant upon a change in the conditions of confinement and not by the procedures required in parole revocation proceedings?

2. Was plaintiff accorded all the process that was due him before he was removed from the work release program?

3. Was plaintiff properly removed from the work release program pursuant to State law?

Statement

This is an appeal from an order of the United States District Court of the Southern District of New York (Motley, J.) dated October 20, 1975, requiring the defendants-appellants to return plaintiff-appellee to the Work Release Program at Fishkill Correctional Facility, to not remove plaintiff-appellee from the program except in compliance with the procedures set forth in 7 N.Y.C.R. § 253 and current standards of due process, and to expunge all records of plaintiff-appellee's tranfer from Fishkill to Green Haven Correctional Facility.

On November 3, 1975, this Court denied defendant-appellants' motion for a stay pending appeal.

Statement of Facts and Proceedings Below

Plaintiff is presently incarcerated pursuant to a judgment of conviction for the crime of manslaughter first degree entered by the Nassau County Court (Kelly, J.).

Plaintiff was sentenced on February 28, 1969 to a maximum term of 15 years.

Plaintiff was transferred to the Fishkill Correctional Facility and placed in the Work Release Program* on August 31, 1973. On several occasions, he failed to follow the regulations governing the program, and in February, 1974, he was warned that further violations of the regulations would probably result in his removal from the program.

On March 22, 1974, plaintiff received a ticket for speeding while on a prohibited excursion. On March 27, 1974, he was given a hearing at which he admitted knowing that he had violated the regulations. He was then removed from the program, and in April, 1974, returned to Green Haven Correctional Facility.

By motion for preliminary injunction dated December 18, 1974 and complaint dated December 19, 1974, plaintiff sought his return to the Work Release Program at Fishkill alleging that he had been denied his rights to due process and his Sixth Amendment right to counsel.

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* Work Release is a form of Temporary Release established by Laws of 1969, chap. 472 § 1, effective January 1, 1970, see New York Correction Law, Article 26 (McKinney's Supp). It permits an inmate within one year of parole or within one year of parole eligibility to work or attend school outside of a correctional facility.

Plaintiff alleged that he was entitled to written notice, a written decision, a statement of the facts underlying the charges, a statement of the rules governing the hearing, an opportunity to call witnesses and to have counsel or a counsel substitute.

An evidentiary hearing was held May 15, 16, and 19, 1975 before the Honorable Constance Baker Motley. The Court, sua sponte, consolidated the trial of the case with the hearing on the motion for a preliminary injunction.

Testimony at trial demonstrated that as a result of a hearing held on March 27, 1974, before the Temporary Release Committee (composed of Anthony DaSilva, Chairman of the Temporary Release Committee and Program Coordinator of the Work Release Program, Robert W. Fisher, Correction Counselor and Mr. McCaffrey) of Fishkill Correctional Facility, plaintiff was removed from the work release program and transferred to Green Haven Correctional Facility.

Anthony DaSilva testified that he instructed the plaintiff's parole officer to place the plaintiff in a hold status on March 26, 1974 and to explain to the plaintiff why he was being placed on hold and what would happen as a result of being placed on hold status (A-137).* Mr. DaSilva testified further that plaintiff's parole officer reported back to him that he had told the plaintiff why he was on hold and that he would see the Temporary Release Committee the next day to discuss his violation of the bounds of confinement agreement (A-166-167).

Plaintiff admitted to signing a statement (Defendants' Exhibit "A" [A-258]) that contained a paragraph entitled "Conditions of Supervision" which bound plaintiff to the terms of the work release program (A-74). He further admitted signing a Bounds of Confinement Agreement (Defendants' Exhibit "B" [A-259]) which stated:

> "His [plaintiff's] Route to travel between Fishkill Correctional Facility and his place of employment shall be the most direct route using primary state roads where ever possible." (A-75).

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* Page references preceded by A refer to the Appendix.

He testified that he understood what the Bounds of Confinement Agreement meant (A-84).

In February, 1974, plaintiff met the Temporary Release Committee and was told that further infractions of program regulations would probably lead to his removal from the program (A-122,135,136,195). He was given oral notice of the charge to be discussed at that meeting (A-122-123, 129-130) and provided an opportunity to explain the charges against him (A-134-135). He was provided a typed copy of the decision of the Committee (A-145) (Plaintiff's Exhibit "5", A-245,175-176).

Plaintiff was provided a hearing before the Temporary Release Committee on March 27, 1974 (A-136,195). His having been out of his bounds of confinement agreement and receiving a speeding ticket on March 22, 1974 and driving an authomobile were discussed with him* (A-137-138 195-196).

Plaintiff admitted that he had violated his Bounds of Confinement Agreement; that he knew at the time he was violating it; and that he had received the speeding ticket.

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* Plaintiff admitted on direct examination that he had been told to turn in his driver's license two weeks prior to the date of the speeding incident (A.60).

He further admitted that he had been warned earlier that a further violation of program regulations would result in his being removed from the program (A-139,195-196). plaintiff himself admitted at trial that he had admitted at the March 27th hearing that he had been out of his bounds of confinement agreement and had received a speeding ticket (A. 58).

The Temporary Release Committee not only had plaintiff's admission, but also had a report from plaintiff's parole officer detailing the speeding incident (A.187-88) (Defendants' Exhibit "D" A. 261).

Plaintiff was provided ample opportunity to reply to the charge (A. 138-140,196). Plaintiff was asked at the March meeting if he could hear. He replied that he could hear (A. 141). Robert Fisher, a member of the Committee who has done extensive graduate work in speech pathology and audiology testified (A. 196):

> "A. Based on the response he gave to my questions, I would say he had no difficulty in hearing. In fact, I asked on two separate occasions during that meeting whether or not Mr. Snyder was able to, one, hear us, and two, understand what we were saying. This was

given the fact that he was wearing a hearing aid at the time.

Q. And what were his answers?

A. To both of those questions he said yes, he was able to hear and was able to understand."

After the March meeting, plaintiff was orally informed of the decision of the Committee (A. 169-70). He was also given a written decision (A. 146-147) (Defendants' Exhibit "E" A. 262,189-190). Plaintiff admitted at trial that he received written notice (A. 65).

A final report was sent by the Temporary Release Committee to the Superintendent recommending plaintiff's removal from the program (Plaintiff's Exhibit "3", A. 237).

Plaintiff's overall adjustment to the work release program was characterized by his correction counselor and the head of the program as unsatisfactory (A. 122,148). However, the particular charges discussed with plaintiff at the March meeting, and which plaintiff admitted, were sufficient in and of themselves to warrant plaintiff's removal from the work release programs (A. 171). The charge discussed with plaintiff at the meeting of the

Temporary Release Committee in February, 1974, leaving the institution without permission, was also serious enough to warrant removal from the program (A. 195), but plaintiff was given one more chance (A. 195). Plaintiff was on warning after the February meeting that any further infraction of program regulations would result in his removal from the program (A. 122,135,136,195).

Opinion of the District Court

In its findings of fact and conclusions of law dated September 19, 1975, the District Court (Motley, J.) found that plaintiff was transferred out of the Work Release Program for program infractions discussed with him at Committee meetings in January, February and March 1974. The Court found that plaintiff was entitled to a Superintendent's proceeding pursuant to 7 N.Y.C.R.R. Part 253 and the requirements of due process set forth in Morrissey v. Brewer, 408 U.S. 471 (1972).

POINT I

REMOVAL FROM WORK RELEASE IS PROPERLY ACCOMPANIED BY THE PROCEDURES ATTENDANT UPON A CHANGE IN THE CONDITIONS OF CONFINEMENT AND NOT BY THE PROCEDURES REQUIRED IN PAROLE REVOCATION PROCEEDINGS.

Although an inmate in a work release program may leave the grounds of a correctional facility for up to fourteen hours a day to work or attend an educational institution, Correction Law § 851(3) and (7), he is, nonetheless, an inmate in a correctional facility. He must be eligible for parole or be within one year of parole or conditional release eligibility. Correction Law § 851(2). Participants thus have not been paroled and are required to travel certain routes and go only to specified places. Correction Law § 851(10). Intentional failure to return to the institution before the specified hour is a felony. Correction Law § 853(6). Before an inmate may participate in a temporary release program, the temporary release committee must determine that such a program is "consistent with the safety of the community." Correction Law § 853(4).

In Morrissey v. Brewer, 408 U.S. 471, p. (1972), the Court explained that a parolee's:

> "condition is very different from that of confinement in prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. . . . In many cases the parolee faces lengthy incarceration if his parole is revoked."

The Court explained further that a parolee's liberty consisted of "many of the core values of unqualified liberty".

Inmates in a work release program are not "citizens in an open society or . . . parolees or probationers under only limited restraints", Wolff v. McDonnell, 418 U.S. 539, 560 (1974). Although they may leave an institution to work or go to school, they must return to that institution which is "a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Wolff v. McDonnell, supra, 418 U.S. at 561.

The fact that participants in the work release program are inmates makes applicable the Court's reasoning in Wolff v. McDonnell, supra, 418 U.S. at 562:

> "[I]t is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not so paramount. The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms of the important aims of the correctional process."
> (Emphasis supplied.)

The District Court cited three authorities that it found applied the Morrissey standards to internal prison disciplinary and transfer hearings. Gomes v. Travisono, 353 F. Supp. 457 (D.R.I. 1973), modified, 490 F. 2d 1209 (1st Cir. 1974), had, however, unbeknownst to the District Court, been vacated by the Supreme Court, sub nom, Travisono v. Gomes, 418 U.S. 909 (1974) and remanded for further consideration in light of Wolff v. McDonnell, supra. On remand, Gomes v. Travisono,

510 F. 2d 537 (1st Cir., 1974), the Court found that an interstate transfer required the minimal due process of Wolff v. McDonnell.

Ault v. Holmes, 369 F. Supp. 288 (W.D. Ky., 1973) similarly was vacated and remanded for consideration in light of Wolff v. McDonnell, supra, by the Sixth Circuit, 506 F. 2d 288 (6th Cir., 1974).* See also Carroll v. Sieloff, 514 F. 2d 415 (7th Cir., 1975); Stone v. Egeler, 506 F. 2d 287 (6th Cir., 1974).

The distinctions between Morrissey v. Wolff are (1) a parolee or probationer has an unqualified right to present witness and documentary evidence while an inmate can do so only when not unduly hazardous to institutional safety or correctional goals; (2) a parolee has a right to confront and cross-examine adverse witnesses unless the hearing officer finds good cause for not allowing confrontation while an inmate has no right to cross-examine or confront adverse witnesses; and (3) a parolee has the right to counsel where he makes a timely and colorable claim that he has not committed the act with which he is charged or

* The third case cited by the District Court, Hoitt v. Vitek, 361 F. Supp. 1238 (D. New Hamp., 1973), affd. 502 F. 2d 1158 (1st Cir., 1973) was decided before Wolff v. McDonnell, supra, and is of questionable authority in light of Wolff and Gomes v. Travisono, supra.

there are substantial and complex reasons in mitigation of the act, Gagnon v. Scarpelli, 411 U.S. 778 (1973), while an inmate who is illiterate or presented with a complex issue is allowed the help of a fellow inmate or a member of the institutional staff.*

As the Court explained in Wolff, the institution must be allowed to exercise its sound discretion as to whether an inmate should be allowed to call witnesses where the calling of a witness "may create a risk of reprisal or undermine authority" 418 U.S. at 566. Potential witnesses and inmates charged with misconduct are incarcerated in correctional facilities and, at times, can be subject to threats, reprisals or other hazards to themselves and institutional safety.

*A superintendent's proceeding, 7 NYCRR Part 253 which is now provided to inmates who face removal from Work Release Program (See Affidavit, A. 266) substantially complies with Wolff and in addition, provides for use immunity, §§ 253.2(c) and 253.4(a); a recording of the hearing, § 253.4(b); the substantial evidence test, § 253.4(g) and (h); review, § 253.6 and assistance from an employee, § 253.3(a).

Similarly, allowing a participant in a work release program to confront or cross-examine witnesses against him might, as the Court recognized in Wolff, "trigger deep emotions" even where "the character of the parties minimizes the dangers involved." 418 U.S. at 568, 569.

Counsel is not permitted at disciplinary hearings so that the proceeds do not acquire "a more adversary cast" and cause delay. 418 U.S. 570.

Participants in work release are, like the inmates in Wolff, living a good part of their lives in a closed prison environment where their relationship with their fellow prisoners are subject to many of the same frustrations and restraints experienced by inmates incarcerated twenty hours a day. The considerations outlined by the Court in Wolff clearly apply to inmates in a work release program.*

* Insofar as the District Court required that an inmate in work release had the right to know what actions will be met with sanctions and the general range of sanctions which may be imposed for given offenses (A.288), such a requirement was clearly prohibited by this Court in Newkirk v. Butler, 499 F. 2d 1214 (2d Cir., 1974) vacated as moot sub nom Presier v. Newkirk, 422 U.S. 395 (1975).

Work Release is clearly a type of confinement, albeit involving conditions more pleasant than incarceration in a higher security institution. Yet it is still incarceration and permits little or none of the core values of conditional liberty provided to a parolee or a probationer. Removal from work release for disciplinary reasons does not remove the inmate from the comparatively free life of a parolee who is free to work and live where he chooses, to associate with whom he desires and to engage in almost all conduct which violates no law. The fact of his incarceration, however, requires that the personnel of the institution have a certain discretion to prevent the potential turmoil that could occur in the institution as a result of a hearing. The limitations on due process set forth in Wolff thus are more appropriate to the situation than the wider rights provided by Morrissey.

POINT II

PLAINTIFF WAS ACCORDED ALL THE PROCESS THAT WAS DUE HIM BEFORE HE WAS REMOVED FROM THE WORK RELEASE PROGRAM.

Since removal from work release must be considered as a change in the conditions of confinement rather than as parole revocation, it follows that plaintiff's removal from work release was governed by the standards set forth in Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971) cert den. 404 U.S. 1049, 405 U.S. 978 (1972), since his removal occurred some months prior to the Court's decision in Wolff v. McDonnell, supra, and Wolff is clearly not retroactive. Wolff v. McDonnell, supra, 418 U.S. at 573-74; Cox v. Cook, 421 U.S. 955 (1975); United States ex rel. Larkins v. Oswald, 510 F. 2d 583 (2d Cir. 1975); Williams v. Vincent, 508 F. 2d 541 (2d Cir. 1974).*

There can be no doubt that plaintiff was provided the due process guarantees set forth in Sostre v. McGinnis, supra, before he was removed from the work release program. In Sostre v. McGinnis, the Court stated, 442 F. 2d 198:

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* Newkirk v. Butler, supra and U.S. ex rel. Haymes v. Montanye, 505 F. 2d 977 (2d Cir. 1974) cert. granted ____ U.S. ____, 43 U.S.L.W. 3683 (June 30, 1975) were also both decided after plaintiff's transfer. At the time of plaintiff's transfer, only the district court in Newkirk v. Butler, 364, F. Supp. 497 (S.D.N.Y., 1973) indicated that a hearing was required prior to a transfer, and that decision was later modified by this Court, and then vacated by the Supreme Court. Clery, since plaintiff was denied no rights under Sostre, he was denied no rights under this Court's opinion in Newkirk.

> "If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be promised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him...and afforded a reasonable opportunity to explain his actions." (citations omitted)

It is clear that at the hearing before the Temporary Release Committee in March 1974, plaintiff was presented with the fact that he had been seen receiving a speeding ticket while driving some distance from his prescribed route. There is no doubt that plaintiff was told that he had been seen by a school official. Plaintiff admitted the charge. He clearly knew that he was violating the program rules. He was given amply opportunity to explain his actions. That the Temporary Release Committee saw fit not to credit his explanation is not sufficient to justify the District Court's substituting its discretion for that of the Committee's, since that exercise of expertise is for those who operate prisons not the courts, See Sostre

v. McGinnis, supra, 442 F. 2d at 188-189; Prounier v. Martinez, 416 U.S. 396, 404-05 (1974).*

Notwithstanding the fact that plaintiff had had two prior hearings, the infraction that plaintiff admitted at the March meeting was sufficient in and of itself to remove plaintiff from the program (A. 171). Plaintiff was clearly informed that further infractions would result in his removal (A. 139,195-96). In any event, the February meeting also satisfied the minimum due process required by Sostre v. McGinnis, (See p. 6, above). It is difficult to imagine a situation involving an inmate's willfully disregarding institutional rules where the facts could be more clearly established than they were here.

* Even in Morrissey v. Brewer, supra, the Court stated that:

> "If, [on remand] it is determined that petitioners admitted parole violations to the Parole Board, as Iowa contends, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter."

POINT III

PLAINTIFF WAS PROPERLY REMOVED FROM THE WORK RELEASE PROGRAM PURSUANT TO STATE LAW

Notwithstanding the fact that removal from work release is now accomplished through a superintendent's proceeding (A. 266), when temporary release programs were enacted, the statute, (Correction Law, Article 26, McKinney's Supp.) did not require that Temporary Release Committees function in the same manner as or in conjunction with Superintendent's proceedings.

Section 851(11) empowers the Temporary Release Committee to revoke temporary release programs at an institution. A temporary release program is defined in § 851(9) to include "educational leave". "Education Leave" is defined in § 851(7) as "a privilege. . .to leave the premises of an institution for a period not exceeding fourteen hours in any day for the purpose of education". Thus, the temporary release committee is empowered to revoke programs such as plaintiff's.

Section 853(8) states, in part:

> "The superintendent of the institution may at any time, and upon recommendation of the temporary release committee or of the commissioner or of the chairman of the State Board of Parole or his designee shall, revoke any inmate's privilege to participate in a program of temporary release." (Emphasis supplied)

This Section thus permitted the decision to revoke an inmate's program to come from the Temporary Release Committee.

Section 854(2) provides that where an inmate violates a program regulation "he shall be subject to disciplinary measures to the same extent as if he violated a rule or regulation of the Commissioner for conduct of inmates within the premises of the institution" (Emphasis supplied). Clearly, that section means that the punishment was to be the same for temporary release program infractions as for other institutional infractions. But, it did not require that the procedures for determining the facts of

the violation be the same. Indeed, for violations of institutional regulations other than those involved with temporary release, the Department procedures involve two different types of proceedings (Adjustment Committee Proceedings, 7 NYCRR, Part 252 and Superintendent's Proceedings, 7 NYCRR, Part 253).

The Superintendent's proceedings, outlined in 7 NYCRR, Part 253, did not require that they be followed by the Temporary Release Committee. Section 253.1(a) states:

> "In any case where there is reasonable cause to believe that an inmate's behavior has constituted a danger to life, health, security or property, or that an inmate has deliberately failed or has refused to follow the guidance and counseling of the adjustment committee, the Superintendent may direct that a Superintendent's proceeding be held."

The Superintendent's proceeding was meant to adjudicate behavior that "constituted a danger to life, health, security or property" or where the inmate failed to follow

the counseling of the adjustment committee. Violation of temporary release regulations were sui generis and were, at that time, governed by a special procedure. The Superintendent's proceeding was originally intended to govern behavioral problems more serious than violations of temporary release regulations. Certainly, punishment for such behavior could be a "permanent change of program, 7 NYCRR 253.5(3) but, until December 2, 1974, an adjustment committee could also "recommend reappraisal of the program of one or more inmates in a report to the Superintendent". 7 NYCRR 252.4(b)(3) ( ). Removal from a program was thus not limited to Superintendent's proceedings in March - April, 1974.

Anthony DaSilva testified at trial (T. 141-43):

> "Q. Why did the Temporary Release Committee not follow the regulations in the 7 NYCRR for Superintendent's hearings or Adjustment Committee hearings?
>
> A. The Temporary Release Committee was set up, as I said, specifically to handle matters relating to work release, at least at that time. There

was no specific procedure detailed as to what the Committee should follow, what rules the Committee should follow. The Committee, however, is the only Committee that could recommend removal from a work release program. It could not be done by Adjustment or at the time by a Superintendent's hearing. That basically is it.

Q. Where you aware of the Superintendent Proceeding regulations?

A. I would never -- I was not aware of it directly in the sense I have never taken part in a Superintendent's Proceeding. We never did use a Superintendent's Proceeding.

Q. Did anyone ever tell you to follow the regulations of a Superintendent's Proceeding?

A. No. As a matter of fact, they were supposed to be strictly apart from the Superintendent or the Adjustment Committee hearing. That I was told.

Q. You were told that?

A. Yes.

Q. By whom?

A. By Mr. Witt, who is the Director of Community Services.

Q. Did he give you any reason why you were not to follow those --

A. Yes. There was a fear at the time that if the Correctional staff had direct control over the inmates within the program that there may be a higher rate of violation, there may be more people removed.

THE COURT: I do not understand that. What did you say?

THE WITNESS: There was a wish at the time to remove the direct control over the inmates in the work release program from Correctional staff and place it into civilian staff.

THE COURT: Into what staff?

THE WITNESS: Civilian staff.

Q. And the reason for that?

A. That there was a fear that some of the officers may not be willing to have inmates continue in a work release type program."

On March 12, 1975, William Donnino, then counsel and Deputy Commissioner of the Department of Correctional Services issued a memorandum (A. 268) requiring that removal from a temporary release program be authorized only after a Superintendent's Proceeding under 7 NYCRR, Part 253.

Clearly, then, the Department, which authorized 7 NYCRR, Part 253, did not intend it to apply to temporary release committee hearings and removal from temporary release before that date.

All the reported state cases concerning removal from work release occurred after plaintiff's last hearing on March 27, 1974. People ex rel. Cooper v. Smith, 77 Misc 2d 666, 354 N.Y.S. 2d 572 (Wyoming County Court, April 10, 1974) (Morrissey applicable to removal from work release); Hatzman v. Reid, 80 Misc 2d 888, 364 N.Y.S. 2d 376 (Sup. Ct. Orleans Co. Feb. 10, 1974) (entitled to notice, hearing, opportunity to controvert factual assertions and to produce witnesses; not entitled to lay advocate or administrative review); Roman v. Ternullo, 81 Misc 2d 1023, 367 N.Y.S. 197 (Sup. Ct., Dutchess Co., Ap. 23, 1975)(Wolff applicable to work release hearings); see also Wilkinson v. Skinner, 34 N Y 2d 53 (May 1974) (current case law requires minimal requirements of Sostre v. McGinnis, supra, viz., inmate has right to know charges and evidence against him and to explain his action before being placed in punitive segregation or solitary; charges should be in writing).

No denial of equal protection can be found because an inmate who was removed from a temporary release program in March, 1974, was provided with oral notice of the charge against him, a hearing at which he admitted the charge against him and at which he was given an opportunity to explain the charges and at which he did not ask for assistance (A. 141) and oral and written notice of the decision but was not provided with written notice, notice that he had a right to remain silent and receive assistance which an inmate subject to a Superintendent's proceeding would receive.

None of the traditional suspect classification like race or alienage was involved. Nor can continuing in a work release program be considered a fundamental right under the Federal Constitution. Therefore, the proper standard of review is whether the distinction bears some rational relationship to legitimate state purposes rather than a standard of "searching judicial scrutiny" or compelling state interest. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Village of Belle Terre v. Borass, 416 U.S. 1 (1974). The rational

basis for the distinction here is that Superintendent's proceedings were presided over by Correction Department staff while the Temporary Release Committee was in the charge of civilian staff with experience and training in counseling and social sciences (A. 185-86). At that time, it was believed that the Temporary Release Program would be better served by being supervised by such a civilian staff. Such a distinction and the fact that that distinction resulted in the use of somewhat different disciplinary procedures cannot be claimed to lack a rational basis. Thus, no denial of equal protection existed.

As the Court stated in McGinnis v. Royster, 410 U.S. 263 (1973) "'[T]he problems of government are practical ones and may justify, if they do not require rough accommodations - illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913)." That the full panoply rights encompassed a Superintendent's proceeding had not, in March, 1974, been extended to removal from work release does not make the procedures employed by the Temporary Release Committee

unconstitutional, since, as the Court recognized in Katzenbach v. Morgan, 384 U.S. 641, 657 (1966), the state may initiate reform step by step. See also Williamson v. Lee Optical Co., 348 U.S. 483 (1955); McDonald v. Board of Election Commissioners, 394 U.S. 802, 809 (1969) with standards of due process existing at the time.

Plaintiff was removed from the work release program on the basis of facts rationally determined after he had a full opportunity to explain all that he desired. His removal was in accordance with State rules and Constitutional due process.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE REVERSED IN ALL RESPECTS

Dated: New York, New York
December 24, 1975

Respectfully submitted,

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of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for defendants-appellants herein. On the 24th day of December , 1975 , she served two (2) the annexed upon the following named person :

MS. JANE BLOOM
Attorney-at-Law
Mid-Hudson Valley Legal Services
50 Market Street
Poughkeepsie, N.Y.

Attorney in the within entitled action by depositing two (2) true and correct copies thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Mary Ko

Sworn to before me this
24th day of December , 1975

David L. Rich
Deputy Assistant Attorney General
of the State of New York